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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re Determination and Allocation of Initial Administrative Assessment to Fund Mechanical Licensing Collective	Docket No. 19-CRB-0009–AA

REPLY TO THE SGA OPPOSITION TO
THE MOTION TO DISMISS PETITIONS TO PARTICIPATE

The Mechanical Licensing Collective (the "MLC") submits this reply on its motion (the "Motion") to dismiss the Petitions to Participate ("Petitions") filed by The Songwriters Guild of America, Inc. ("SGA") and Circle God Network Inc., d/b/a David Powell ("Mr. Powell") in the above-captioned Administrative Assessment Proceeding (the "Proceeding"). The basis for the MLC's motion with respect to SGA is straightforward.[1] The statute restricts the persons or entities eligible to participate in this Proceeding (in addition to the MLC and DLC, who are required participants) to "interested copyright owners, digital music providers or significant nonblanket licensees." 17 U.S.C. 115(d)(7)(D)(iii)(II); 37 C.F.R. § 355.2(d). The SGA is none of the above.

Consistent with its Petition, SGA's opposition not just concedes, but insists that it is not a copyright owner. *See* SGA's Response in Opposition to the MLC's Motion to Dismiss SGA's Petition to Participate ("SGA Opp.") at 2 ("SGA was careful to note in its Petition that the organization is not itself a copyright owner"); *id.* (SGA is "a copyright administrator rather than

[1] Mr. Powell filed a "motion rebuttle for immediate breach, objection raised not to dismiss." The MLC does not believe it necessary to respond to Mr. Powell's motion and continues to assert that Mr. Powell is not eligible to participate for the reasons set forth in the MLC's Motion, which have not been rebutted by Mr. Powell's filing.

a copyright owner"); *id.* (SGA's members "as a matter of principle [] retain ownership of all rights.") (emphases supplied).

SGA argues that, while it is adamantly not a copyright owner, the CRJs should read "expansively" the definition of copyright owner because SGA acts as a "watchdog" over the rights of songwriters, including through legislative activities and in mechanical rate-setting hearings. *Id.* at 1, 2. But the useful services that the SGA provides to songwriters and their heirs do not change the law or the SGA's admission that it is not a copyright owner, which ends the inquiry.[2] And the rules governing this Proceeding differ from those governing rate-setting proceedings, and the parties eligible to participate in this Proceeding are more limited than those eligible to participate in rate-setting proceedings. While any party establishing that it has "a significant interest in the subject matter of the proceeding" may participate in a rate-setting proceeding (37 C.F.R. § 355.1(b)), only the designated MLC and DLC, copyright owners, Digital Music Providers, and Significant Nonblanket Licensees may participate in this Proceeding. 37 C.F.R. § 355.2(c), (d). Thus, while non-copyright-owning trade associations may participate and have participated in rate-setting proceedings, they may not participate in this Proceeding.[3]

[2] The rules of statutory interpretation do not allow "expansive readings" so as to include "not a copyright owner" (SGA's self-description) under the definition of "copyright owner." *See Clark v. Rameker*, 573 U.S. 122, 131 (2014).

[3] SGA's inscrutable argument that non-copyright owners should be able to participate in the Proceeding, because copyright assignees (who are defined in the Act as copyright owners) can participate and assignments can be subject to statutory termination, does not make sense. (SGA Opp. at 2 n. 1) Copyright ownership, if only by virtue of the limited duration of copyright protection, is inherently impermanent in the hands of anyone. But copyright ownership is determinable at any point in time, and the mere fact that a current copyright owner may someday no longer be a copyright owner is meaningless. The possibility of future termination of a copyright assignment makes the current assignee no less of a copyright owner in the present, as copyright ownership is defined in the Act to include ownership of an interest in copyright by virtue of "an assignment, mortgage, exclusive license, or any other conveyance, *(cont'd)*

As a required participant in the Proceeding, the MLC is constrained to make clear that it would both run contrary to the statute and set a dangerous precedent to allow ineligible parties to participate in the Proceeding. Additional parties add additional burdens and costs, including additional costs to engage in discovery, costs to address written submissions, and costs at the hearing, which would serve to both increase the assessment proceeding costs to the MLC and divert MLC resources without good cause.

The Proceeding is to decide the limited issue of the amount and terms of the initial administrative assessment. *Id.* § 115(d)(7)(D). SGA's self-ascribed songwriter watchdog role does not explain an interest in the Proceeding, let alone one that would justify violating the statutory limits on eligibility to participate. To begin with, the MLC already has substantial songwriter participation in its governance, in the form of its songwriter and songwriter trade group board and committee members. 17 U.S.C. § 115(d)(3)(D); *Designation of Music Licensing Collective and Digital Licensee Coordinator*, 84 Fed. Reg. 32274 (Jul. 8. 2019), at 32276-77. Moreover, SGA will have access to review the MLC and DLC public submissions in the Proceeding. It does not need to participate in the Proceeding to do so (and it would not be able to review Restricted materials under the protective order in the Proceeding even if it was a participant).[4] The MLC welcomes SGA's advocacy "for the principle that allocations to the MLC must be sufficient for it to fulfill its mandate to mount a robust, global search for the true owners of unmatched works, as well as to fulfill its other statutory duties" (SGA Opp. at 3), but

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alienation, or hypothecation of copyright or any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license." 17 U.S.C. § 101 (emphasis added).

[4] The MLC has solicited and welcomes SGA's proposals and input on budgeting, all of which can be transmitted without diverting resources to SGA's participation in the Proceeding when it is ineligible to participate. SGA has to date provided no information to the MLC concerning budgeting, despite the MLC's requests.

such advocacy does not require or permit its participation in the Proceeding when it is not otherwise eligible to participate.

CONCLUSION

For the reasons sent forth above, the Petitions of SGA and Mr. Powell should be dismissed.

Dated: September 10, 2019

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Tuesday, September 10, 2019, I provided a true and correct copy of the MLC Reply to SGA Opposition to Motion to Dismiss to the following:

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Signed: /s/ Benjamin K Semel